

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.200 OF 2001

Manoj alias Bandu Narayan]
Garole, Age 26 yrs.]
Occ: Labourer, Resident of]
Raj Nagar, Ota Scheme, Nigdi]
Pune. (Presently lodged in]
Yerwada Jail, Pune]..Appellant
(Ori.Accused No.6)

Vs.

The State of Maharashtra]..Respondent

...
Smt.Revati Mohite-Dere Adv.for Appellant
Smt.Usha Kejariwal A.P.P. for State
...

CORAM: N.V.DABHOLKAR AND

SMT.V.K.TAHILRAMANI, JJ.

DATE : MARCH 1, 2006

ORAL JUDGMENT (PER DABHOLKAR, J.):

1. Although as many as eight accused persons were tried for the charge for offences punishable under Sections 143, 148, 324, 302 r.w. 149 of IPC only

accused no.1 Mahesh and accused No.6 Manoj/present appellant were convicted. Accused Nos.2, 3, 4, 5 and 8 were acquitted of all the charges. Accused no.1 Mahesh was held guilty and convicted for offence punishable under Section 324 of IPC and he was sentenced to imprisonment equivalent to the period already undergone as under trial prisoner.

. Present appellant is held guilty for offence punishable under Section 302 of IPC and consequently sentenced to suffer life imprisonment, pay fine of Rs.100/- in default simple imprisonment for two months. Feeling aggrieved by said finding of guilty, conviction and sentence, original accused no.6 has approached this Court by present appeal.

2. The prosecution story as can be gathered from the complaint (Exhibit-23) lodged by P.W.1 Gurudev Singh Suni, according to which, incident took place in two parts, can be narrated as follows:-

. Complainant Gurudev Singh and accused are known to each other since they are residents of same

locality. Complainant has shifted to that locality since five years prior to alleged incident. It is said that relations between the parties were cordial till the alleged incident. One girl Pinky was neighbour of complainant and accused persons used to tease Pinky. Complainant had requested them not to tease the girl, on 2-3 occasions and this has caused strain in the relationship between the complainant and accused persons.

. The incident in question took place on 19th of October, 1998. During the first part which took place at 7.00 p.m., complainant Gurudev Singh was sitting in front of his house when accused Nos. 1, 2, 3, 4, 6 (appellant) and 8 came there, armed with wooden logs, iron pipes and sword. They asked complainant not to behave rudely (Tu Dadagiri Kartos). Saying so they charged towards complainant. While complainant tried to run away accused Nos. 1 and 6 chased him and dealt with knife blows on his back. Complainant started running towards Yamunanagar Out Post for reporting the matter. At that time, he was accompanied by his brothers Gorakhsingh, Kanchansingh and Hirasingh (victim), (infact, according to complaint

(Exhibit-23), only Hirasingh accompanied him to the police station and reference to Gorakhsingh and Kanchansingh in the deposition is an improvement). At the out post, complainant narrated his grievance to the police, whereafter, couple of policemen accompanied him (P.W.2 Janardan and P.W.3 Mohan). By the time, this party was near a location by the side of Hanuman Sweet Home, accused Nos.1, 2, 4, 5, 6 and 7 were seen approaching from opposite direction. They were armed with gupti, swords, iron pipes, sticks etc. Complainant drew attention of the policemen accompanying him to this gang and also identified the accused No.1 Mahesh as the person who had earlier assaulted him.

. According to complaint (Exhibit-23), at this juncture, policemen accompanying him accosted Mahesh and at the same time, Bandu alias Manoj (present appellant) dealt a blow with sword on the stomach of complainant's brother Hirasingh. The wording in the complaint is not clear whether appellant himself had the sword or he had taken the sword from accused No.1 Mahesh, who was caught by the policemen. Hirasingh collapsed on the spot. He was taken to Y.C.M. hospital Pimpri in a

rickshaw. At the hospital, Hirasingh was declared dead. This later part of the incident took place at 7.30 p.m.

. Except arrested accused Mahesh, all other accused had taken to their heels. Complainant Gurudev Singh reported the matter at police station Nigadi. However, even on referring to Exhibit-23, we do not find any endorsement of the police station regarding registration of crime on the basis of the same or the time at which the same was registered, although it is attested by Assistant Police Inspector attached to Nigadi police station, Pune. The investigation was carried out by A.P.I. Kshirsagar and Police Inspector Sunil Gharage (P.Ws. 10 and 11).

3. Prosecution has examined in all 11 witnesses to support the case. Complainant Gurudev Singh Suni (P.W.1), police constables Janardan and Mohan (P.Ws.2 and 3) as also Rasalsingh (father of deceased and P.W.5) provide direct evidence. Out of the four witnesses, complainant and his father speak about both parts of the incident whereas two constables speak about second part of the incident

with which we are concerned for the purpose of present appeal. P.W.6 Sham Taras is a panch witness to the panchnama of spot of occurrence. P.W.7 Ashok Joshi although a panch witness is of greater importance. Discovery of weapon Gupti at the instance of the information given by the appellant-accused, is said to have been witnessed by this witness Ashok Joshi (Memorandum and Panchnama are at Exhibits-33 and 34 respectively). As per report of the Analyser, the blade of Gupti was stained with human blood of group 'B'. Dr.Milind Sonawane (P.W.9) is Autopsy Surgeon and according to him, Hirasingh suffered death because of traumatic and haemorrhagic shock due to stab injury to lung. The post mortem notes recorded by Dr.Milind are at Exhibit-39. On reference to column no.17 of the same, it is evident that victim Hirasingh had suffered only one external injury and corresponding damage to internal organs. As already referred, P.Ws. 10 and 11 are police officers attached to Nigadi police station who had carried out the investigation.

. For the purpose of present appeal, we are not at all required to refer to the evidence of P.W.4

Rehman Shaikh and P.W.8 Dr.Rajendra Bhosale. This is because, they provide evidence regarding offence committed by accused no.1 Mahesh. Rehman is a panch witness, in whose presence accused no.1 is said to have given out weapon sword. Upon considering the record of the trial Court, this sword does not seem to have been sent to Forensic Science Laboratory, probably because, there was no suspicion of blood stains on the blade of the sword. Dr.Rajendra Bhosale (P.W.8) was Medical Officer who had clinically examined complainant Gurudev Singh and certified the injury suffered by him. On reference to medical certificate (Exhibit-37), it is evident that complainant has suffered one incised wound over back inter scapular region right side. The injury was only skin deep although bleeding and there was no internal damage suffered because of the same. Accused no.1 does not seem to have approached this Court so far his conviction under Section 324 of IPC; probably because, there was sentence of imprisonment equivalent to the period already undergone as an under trial prisoner. These two witnesses throw light upon the prosecution story to the extent of charges levelled against accused no.1 and

therefore, the evidence of those two witnesses, is not relevant for the purpose of considering the present appeal. The learned advocate for the appellant has yet referred to some evidence on record pertaining to earlier incident, when the complainant was injured and for which accused no.1 alone was convicted, in order to assail credibility of the prosecution witnesses as also reliability of the investigation.

4. Heard advocate Smt.Revati Mohite-Dere for the appellant and Smt.Usha Kejariwal for the Respondent-State.

. Having gone through the impugned judgment (in vernacular) we can say that trial Court has held accused no.1 Mahesh guilty for the offence punishable under Section 324 of IPC for inflicting cut injury on the back of the complainant Gurudev Singh by a pen-knife. He has held present appellant guilty for the offence punishable under Section 302 of IPC i.e. for causing murder of Hirasingh. So far as both the parts of the incident are concerned, the learned Judge has arrived at a conclusion that there was no proof of

unlawful assembly, much less; of the actions of accused no.1 and others during the respective parts of the incident to be actions in furtherance of common object of such unlawful assembly. The learned trial Judge has observed that the manner in which the episode commenced on that day, object of the accused was evident. They wanted to scare the complainant, because in the past he had warned them against teasing Pinky. Second part of the incident being follow up of the first one, and soon after first one, the learned Judge felt that even after taking into consideration the prosecution story as it is, it may not be said that there was pre-concert and all the accused had arrived on the scene with common object, which was executed only by actions of accused no.1 Mahesh and accused no.6 Manoj alias Bandu, in two parts of the incident. We cannot avoid feeling that. These observations of the trial Court which are not challenged by the prosecution, have made the basic task of prosecution to defend the appeal, more difficult. As can be seen, even according to prosecution story, this is a case wherein there was only one object Hirasingh, only one assailant/present appellant, and only one stab injury. Naturally,

prosecution is obliged to establish that appellant and appellant alone was the author of the injury. The defence has not raised dispute regarding cause of death or injury being fatal and sufficient in the ordinary course of nature to result into death of the victim.

5. To refer to some salient features in the impugned judgment, we can say that learned Judge partly believed the prosecution story so far as the first incident. Although complainant had said that accused nos.1 and 6 inflicted him injuries by means of pen-knife. Because there was isolated injury on the back of the complainant and because, Rasalsingh (P.W.5 and father of complainant) did not attribute authorship to any injury to the complainant to accused no.6, the trial Court by arithmetical subtraction has held accused no.1 alone guilty for offence punishable under Section 324 of IPC. While observing in para 7 that there is no evidence to uphold the plea of unlawful assembly, as raised by the prosecution, the trial Court also observed that P.W.5 Rasalsingh was exaggerating the occurrence (first part).

. So far as the second part of the said incident is concerned which is subject matter of the present appeal, the trial Court has reproduced the prosecution story in para 8. According to learned trial Judge, evidence of complainant pertaining to second part of the incident was corroborated by discovery of Gupti at the instance of accused no.6/appellant, report of the analyser showing the blade of Gupti to have been stained with human blood of group 'B' which was blood group of the victim and also by oral evidence of two police constables viz. Janardan and Mohan, the learned Judge therefore, was inclined to believe the story narrated by complainant Gurudev Singh that it was the appellant who inflicted the single stab injury upon deceased Hirasingh. According to learned Judge, although injuries suffered by accused no.1 are brought on record, those were superficial and prosecution was not obliged to explain those. Otherwise also, injuries suffered by accused no.1 would be defence so far as the first part of the incident is concerned, and not regarding later part of the incident which is subject matter of present appeal. Unfortunately, the learned trial Judge has dealt with discrepancies regarding the weapon used

in a very cryptic manner in para 16 of his judgment. The learned Judge has observed that, in the depositions of witnesses, there appear minor discrepancies but all the witnesses were sticking to consistent story of accused Manoj having inflicted stab injury upon deceased Hirasingh and therefore, the variance between the witnesses inter se regarding the weapon used by appellant, according to learned trial Judge, could not affect the merits of the prosecution case that appellant inflicted stab injury upon Hirasingh. In fact in para 21 of the judgment, the learned Judge has recorded his reasons for disbelieving the theory of unlawful assembly. The learned trial Judge has also referred to the fact that incident occurred at about 7.30 p.m. in winter season which are considerably dark hours and therefore, learned Judge has observed that witnesses could not have observed each and every individual from the assembly and overt acts on the part of each and every individual. Having recorded the finding of guilty as observed against accused nos.1 and 6 respectively for the offence punishable under Section 324 and 302 of IPC, the learned Judge imposed suitable punishments upon them.

6. Advocate Smt.Mohite-Dere while assailing the impugned judgment, has advanced three main submissions; Deposition of complainant himself is unreliable due to inaccuracy regarding the weapon used for assault on Hirasingh. She has also relied upon the incidents on record although not strictly related to action of inflicting injury upon Hirasingh, for the purpose of demonstrating character of complainant as a witness. According to her, complainant is a witness who is narrating to the Court the details of the incident as felt suitable by him to secure conviction of the present appellant. She has also claimed that P.W.5 Rasalsingh father of complainant is also unreliable witness because, his presence itself is not referred by P.Ws.1,2 and 3. According to her, investigation agency has shown over enthusiasm and abnormal keen interest in favour of complainant in this matter. She has, therefore, urged that prosecution has failed to prove the case by cogent and reliable evidence. She prayed for acquittal in favour of her client.

. Learned A.P.P. opposed each and every

propositions submitted by learned counsel.

7. So far as evidence of P.W.5 Rasalsingh, learned advocate is justified in submitting a possibility that he may be a witness tailor-made for the purpose although he might not have been present at the time of alleged incident in two parts. On reference to complaint (Exhibit-23) which was reduced to writing while the events were fresh in the memory of the complainant, there is no reference to presence of Rasalsingh or Rasalsingh having accompanied complainant to the Police Station. In fact, complaint only refers to presence of Hirasingh. The complainant narrates that as the accused tried to grab him, he sought his own escape and in the process, accused nos.1 and 6 dealt him blows with pen-knife in his back. There is reference to presence of only Hirasingh as a person who ran with the complainant towards Yamunanagar police chowky. Even during his chief examination, the complainant does not refer to presence of his father or father having accompanied him to Yamunanagar police chowky. This is inspite of the fact that during the oral evidence complainant has doubled the party by referring to

other two brothers Gorakhsingh and Kanchansingh as the persons who accompanied him to Yamunanagar police chowky. Even then, there is no reference to father Rasalsingh. P.W.2 Janardan narrates that complainant accompanied by his brother Hirasingh had come to police out post Yamunanagar. During his cross-examination, he confirmed this position by specifically saying that Rasalsingh, Gorakhsingh and Kanchansingh had not approached police station. Similar is the version of P.W.3 Mohan on this count. Thus, when the complaint (Exhibit-23) as also three persons who claim to be eye witnesses to second part of the incident and complainant who was sufferer of the first incident, do not make any reference to presence of Rasalsingh, it is difficult to accept presence of Rasalsingh at the location of both the incidents or of his being eye witness to entire episode. Rasalsingh is aged 58 years when his evidence was recorded on 23rd November, 2000. The incident had taken place a couple of years earlier. After narrating both the portions of the incident, Rasalsingh does not narrate anything as his reaction to the same. According to him, during the first incident while complainant was at the platform of the house, he

was at the door frame. After accused no.1 Mahesh challenged the action of Gurudev Singh of warning them about teasing to Pinky, according to Rasal Singh, there was scuffle between Mahesh and the complainant and then accused no.1 dealt with knife blow on the back of the complainant. He himself claims to have accompanied complainant to Yamunanagar police out post along with complainant, victim as also other two brothers (Gorakhsingh and Kanchansingh). In fact, after going through the chief examination of Rasal Singh, so far as second part of the incident, he has not narrated as to what role was played by the policemen, who accompanied them upon complainant narrating the first part of the incident. He is unaware of the fact that accused no.1 Mahesh was apprehended by P.Ws.2 and 3.

8. We feel that the learned counsel was justified in advancing submission that possibly Rasal Singh is a got up witness. This is because, his presence is not referred by anybody else and he does not know the manner in which the incident occurred. It is not the case of the complainant that he had scuffle with accused no.1 but it is his claim that while he

was trying to escape, accused persons inflicted injury upon his back. We do not wish to refer to each and every omission or contradiction, suffice it to point out that he has not narrated in his statement to police that Hirasingh was stabbed with Gupti and he was unable to explain the omission which is on a vital issue.

9. So far as complainant is concerned, many incidents can be pointed out which speak against his reliability. When we say that P.W.5 Rasalsingh is possibly a got up witness, although father of complainant, not only prosecution is obliged to explain this, but the complainant's version is required to be approached with a greater caution.

. So far as the first part of the incident is concerned, complainant himself was the victim, according to him, he was on the platform of his house and yet he was inflicted injuries on his back by means of a sharp weapon by accused nos.1 and 6. Medical evidence has falsified him partly. He has suffered only one injury skin deep to his back although it is his claim that couple of accused persons inflicted injuries on his back. In fact,

he had also so narrated when he went to police out post. It appears that one Dilip Vithal Shinde was arrested in connection with this crime. Complainant was uncomfortable to admit this fact. On reference to para 14 of his evidence which is part of his cross-examination on behalf of accused no.8, he has contradicted as many as three portions from his supplementary statement. These portions were subsequently proved by Investigating Officer Shri.Kshirsagar and these portions read thus;

- . "(Translation) **Portion - 'A'**- When police had shown me leader Dilip, I was in sorrow due to death of my brother, I had also consumed little liquor and therefore, I had informed the police that Dilip was the person who had participated in beating me and my brother;
- . **Portion - 'B'**- After enquiry with the people in the vicinity he had learnt that it was Ravi Babu Londhe who was involved in the incident of beating him and his brother on 19.10.1998 at 7.00 p.m. and because, he did not know full name of Ravi Babu Londhe, he had named the assailant as Dilip.
- . **Portion - 'C'**- Dilip was not the person who had assaulted him and his brother.

. In fact therefore Dilip was discharged from the matter. These contradictions on the part of the

complainant Gurudev Singh proved by the Investigating Officer also speak against reliability of complainant. He is capable of accusing anything against anybody, but according to convenience and suitability of his case.

10. Now we come to main reason for which the learned counsel for the appellant has insisted that evidence of Gurudev Singh regarding the incident during which Hiras Singh suffered single fatal stab injury is required to be disbelieved. On reference to complaint (Exhibit-23), that portion is narrated thus:-

. " (Translation) At that time, I pointed out to police that he was Mahesh Garole. Upon this, police caught Mahesh Garole from the people who were advancing towards us. At that time, Bandu dealt with a blow in the abdomen of my brother Hiras Singh by means of sword in his hand and others also beat him".

. This very incident is narrated by complainant during the recording of his evidence;-

. "I had specifically pointed out accused no.1 Mahesh. Accompanying

police caught hold accused no.1 Mahesh. Sword in the hands of accused no.1 Mahesh was taken from him by accused no.6 Manoj. He had also with him a Gupti. At that time, accused no.6 Manoj stabbed my brother Hirasingh with Gupti in the left side back 'bogal' (by the side of ribs). Rest of the accused persons then assaulted Hirasingh with weapons in their hands."

. As per the complaint, the weapon used to inflict the single stab injury was a sword, during the deposition, complainant has switched over to Gupti. Such an improvement at the cost of contradiction with the complaint, cannot be said to be very innocent or ignorant. It is apparent that the sword was recovered at the instance of accused no.1 and was never sent to the analyser. Gupti is said to be discovered at the instance of present appellant and analyser's report indicates that blade of the Gupti was stained with human blood of group 'B'. Probably report has motivated complainant to effect the change in his story with regard to weapon used by appellant to wage assault upon victim Hirasingh. Even before the Court, complainant did not fail to add his own spice. According to him, other accused persons also assaulted Hirasingh with the weapons with them.

Unfortunately for the complainant, according to medical evidence, Hiras Singh has single stab injury. The narration of the complainant that appellant took away sword from accused no.1 and yet dealt with the blow by means of Gupti to the victim, also does not appear to be natural and probable. Probably, this is the verbal circus in which the complainant has indulged, in order to reconcile the contradiction that he was going to create by deposing that weapon used was Gupti and not the sword.

11. The learned trial Judge has felt convinced by complainant's evidence being reliable because of support drawn from discovery under Section 27 of the Gupti at the instance of the appellant. Unfortunately, the learned Judge in the same judgment has disbelieved the investigation so far as the claim of discovery of sword at the instance of the accused no.1 is concerned. That discovery panchnama could be seen to be false for obvious reasons. Accused no.1 was said to have been arrested on the spot. He had been in custody of the police throughout and therefore, the discovery of sword concealed at the residence of accused no.1

was patent falsehood. This was because, accused no.1 had no occasion to visit his house and conceal the sword at the house. Investigation having maligned itself with such type of investigation, the Court would be justified in being slow in believing the discovery panchnama of similar type.

. Although P.Ws.2 and 3 have supported the complainant, it is evident that they were not certain about weapon used by the assailant to inflict fatal injury to Hirasingh. Both policemen have described the weapon as sword like weapon. P.Ws.2 and 3 are policemen. Weapons like knife, pen-knife, Gupti or sword are not new to them. Although complainant has tried to exaggerate and say that all accused had pounced upon the victim thereby trying to convert the incident into a melee, ultimately it seems to be an incident of one victim, one assailant and one blow. Neither of the policemen nor the complainant were target of the group. They were in the close vicinity of the victim and had ample opportunity to observe the weapon and the manner of assault (if the prosecution story is true), yet none of the three eye witnesses are certain about the weapon used.

We feel that in the situation like this i.e. single victim, single assailant and single blow, if the witnesses who claimed to be eye witnesses are not sure about the weapon used, we are afraid; no implicit reliance can be placed upon the testimony of such witnesses as truthful and genuine.

12. Learned counsel for the appellant has come with a serious allegation against Investigating Agency. According to her, the agency took a partisan attitude and she has mainly relied upon the panchnama under Section 27 of the Indian Evidence Act regarding discovery of sword at the instance of accused no.1 (Exhibit-28) and it is obvious also. We have not been able to fix time as to when the complaint of the complainant is registered. On reference to Exhibit-23, although each and every page is signed by same police officer in the margin and attested by A.P.I. Nigadi Police Station, Pune, the document nowhere bears the endorsement of registration of crime. Thus, it is impossible to say as to when this F.I.R. was written and when it was tendered to the police station. Although P.W.10 Shri.Kshirsagar said that he has recorded statement of Gurudev Singh

at the hospital, yet he has not referred to the time of recording and it can only be said by reference to Certificate (Exhibit-37) regarding injury suffered by Gurudevsingh, which shows that he was clinically examined by Doctor at 8 p.m. and hence, complaint can be said to have been recorded sometime thereafter.

13. Admittedly, although each out post maintains a khabri book (occurrence report) in which complaints received are noted, no entry regarding the incident in question is taken in the khabri book of Yamunanagar out post (para 3 of evidence of Mohan Dongre) and the reason given is flimsy that Police Head Constable who takes such entries, was not present at the out post at that time.

14. Last but not the least, we may once again refer to the cross-examination of father Rasalsingh (P.W.5) and more particularly, contradiction 'A'. Rasalsingh has denied to have stated before the police that they cut branches of the trees and to have resisted the accused persons, but this portion marked 'A' from his statement is proved by Investigating Officer Shri.Kshirsagar (P.W.10). On

reference to panchnama of scene of occurrence (Exhibit-31), it is evident that two branches of 'Gulmohar' trees were found lying on the location.

15. Upon taking into consideration the tenor of evidence of eye witnesses and more particularly that of complainant and his father, there are sufficient reasons to believe that they are witnesses capable of changing their versions and making statements as suitable to their purpose. There are at least hints on record that Investigating Agency was with the complainant and at times, they have indulged into dishonest investigation. Taking overall view of all the circumstances on record, we have not been able to avoid feeling that complainant is presenting a picture of the occurrence suitable to his purpose and not in the manner the incident took place. We therefore, feel that the appeal must succeed and hence, the following order:

16. Appeal is allowed. Judgment and Order dated 26.12.2000 delivered by Additional Sessions Judge, Pune in Sessions Case No. 415 of 2000 thereby convicting appellant for the offence punishable

under Section 302 of IPC is quashed and set aside. He is acquitted of the charge. He shall be set to liberty forthwith, if not required in any other case. Fine amount shall be refunded to him.

. Registrar (Judicial) shall ensure early dispatch of appropriate writ to the prison authorities.

[N.V.DABHOLKAR, J.]

[SMT.V.K.TAHILRAMANI, J.]